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CLARIFICATION OR AMENDMENT (CAS) PETITIONS GUIDELINES
FACTORS TO PROVE/DISPROVE AND EVIDENCE TO SUBMIT

These materials articulate the factors that the parties must establish for each element of their claim or defense as well as provide guidance to the parties about the evidence that they may submit to assist the Labor Relations Commission (Commission) to evaluate their legal positions. These materials are not intended to be exhaustive. Parties are free to submit any information and documents that they feel may assist the Commission to make a determination in each case. However, **there are four documents that must be filed with every CAS petition**: 1) a complete copy of the parties' most recent collective bargaining agreement; 2) an accurate job description for each disputed position;¹ 3) a current organizational chart;² and 4) sworn affidavits from individuals with personal knowledge of the facts at issue in the case. **If these documents are not filed with the Commission, the CAS petition may be dismissed.**³

¹ For each job description submitted to the Commission, the parties must indicate whether it fairly and accurately describes the job duties performed by the incumbent in the disputed position. If a party disputes the accuracy of the job description, the party must specifically identify the disputed duty and the reason for the dispute as well as provide an affidavit or other evidence in support of its claim. If there is not an accurate job description in existence or if one cannot be obtained, the parties' written submissions should fairly and accurately describe the disputed position's job duties in enumerated paragraphs.

² For each organizational chart submitted to the Commission, the parties must indicate whether it fairly and accurately depicts the employer's organizational structure. If a party disputes the accuracy of the organizational chart, the party must specifically identify the source of and the reason for the dispute as well as provide an affidavit or other evidence in support of its claim. If the parties do not have a current organizational chart, they should create one to submit to the Commission.

³ If a petitioner requests any of these documents but does not receive them prior to the CAS petition's filing date, the petitioner may submit to the Commission, instead, proof that it has requested these documents and not received them.

I. Contract Bar Rule

A. Factors

The contract bar rule is a threshold procedural requirement that is set forth in 456 CMR 14.06(1)(b). The rule mandates that a CAS petition must be filed:

1. within 150-180 days of the expiration of a collective bargaining agreement;
or
2. after the expiration of a collective bargaining agreement.

There are three exceptions to the rule:

1. the disputed position is newly created;
2. the job duties of the disputed position have substantially changed; or
3. there is good cause to excuse an inappropriately-filed petition.

B. Examples of Evidence

To demonstrate whether the first exception to the contract bar rule applies, the parties may submit a dated **job posting** for the disputed position. The parties' submissions should indicate when the employer created and filled the disputed position as well as the incumbent's name and level of pay and benefits.

To show whether the second exception applies, the parties may submit the **former position description** along with the current one. If a change in job duties is alleged, the parties' submissions should contain a detailed comparison of the former and current duties and responsibilities.

Although the Commission rarely finds good cause to excuse inappropriately-filed CAS petitions, petitioners may relate any facts that they wish the Commission to consider on this subject in their submissions.

II. Managerial Employees

A. Factors

A managerial employee is someone who:

1. participates to a substantial degree in formulating or determining policy;
2. assists to a substantial degree in the preparation for or the conduct of collective bargaining on behalf of a public employer; or
3. has a substantial responsibility involving the exercise of independent judgment of an appellate responsibility not initially in effect in the

administration of a collective bargaining agreement or in personnel administration.

B. Examples of Evidence

To show the degree, if any, the incumbent in the disputed position participates in policy-making, the parties should supply the Commission with any **policies** that the employee has drafted. The parties should explain who recommended the policy's adoption, drafted it, and, if applicable, approved of it before implementation. The parties also should indicate the frequency with which the employer accepts the employee's policy recommendations.

The parties may assist the Commission to determine whether and to what degree an employee participates in collective bargaining by submitting **documents related to the parties' last round of negotiations either for a successor contract or for a mid-term issue**. The parties should detail the role that the incumbent in the disputed position plays during the bargaining process. If the employee recommends negotiating proposals, the parties should list the proposals that the employee recommended during the last round of negotiations, either for a successor contract or for a mid-term issue, and indicate when the employee recommended them and whether the employer accepted them.

Independent judgment may be illustrated by furnishing copies of **Step 2 or higher grievance decisions** that the incumbent in the disputed position has made. If the incumbent in the disputed position assists in administering the collective bargaining agreement, the parties should identify the applicable portion of that agreement, explain what duties the employee performs with respect to it, indicate the frequency with which the employee performs those duties, and list examples. Similarly, the parties should explain the employee's functions regarding personnel matters, if applicable, list examples, and show the frequency of his or her involvement.

III. Confidential Employees

A. Factors

To be regarded as confidential, an employee must have a continuing and substantial relationship with a managerial employee that creates a legitimate expectation of confidentiality in their routine and recurring dealings. Employees who have significant access or exposure to confidential information concerning labor

relations matters, management's position on personnel matters, or advance knowledge of the employer's collective bargaining proposals are excluded as confidential.

B. Examples of Evidence

The parties should indicate to whom the incumbent in the disputed position reports and to what bargaining unit, if any, the supervisor belongs. If the employee's job duties allegedly involve budgetary, grievance, negotiating, hiring, promotion, and/or disciplinary processes, the parties should specify the employee's role and the type of information or documents that the employee handles or reviews.

IV. Accretion Analysis

A. Factors

In analyzing whether employees should be accreted into an existing bargaining unit, the Commission uses the following three-step test.

1. The Commission determines whether the disputed position was included in the original certification or recognition of the bargaining unit.
2. If the disputed position was not included in the original certification or recognition of the existing bargaining unit, the Commission examines the parties' subsequent conduct, including bargaining history, to determine whether the employee classifications were considered by the parties to be included in the unit.
3. If the parties' subsequent conduct does not demonstrate whether the employee classifications were considered by the parties to be included in the unit, the Commission examines whether the positions sought to be included in the unit share a community of interest with the existing positions. If the Commission determines that the requisite community of interest exists, it accretes the petitioned-for employee into the existing bargaining unit.

In some cases, the outcome of the third part of the test, community of interest, may be affected by whether the incumbent in the disputed position is a supervisory employee. When examining whether an employee is a supervisor, the Commission considers factors like:

1. the independent judgment and authority to assign and to direct the work of employees;
2. the authority to initiate and to recommend discipline;
3. the authority to adjust grievances; and
4. the independent authority to make, or the power to recommend effectively, personnel decisions like hire, transfer, suspend, promote or discharge employees.

B. Examples of Evidence

The parties should provide the Commission with a copy of the **original certification** or, if unavailable, the number of the case in which the Commission certified the bargaining unit. If the disputed position is not new, **the recognition and duration clauses of the collective bargaining agreements that were in effect since the position's creation** should be submitted. To ascertain community of interest, the parties should submit **job descriptions of other employees in the bargaining unit** in which the party claims the disputed position shares a community of interest. Additionally, the parties should provide the Commission with information related to the skills and functions, similarity of pay and working conditions, common supervision, work contact and similarity of training and experience between the disputed position and other positions in the existing bargaining unit.

If the supervisory status of the disputed position is at issue, the parties should describe what work, if any, the incumbent may assign to others and whether the recipients of the work assignments are members of the existing bargaining unit. The parties should indicate whether the incumbent in the disputed position evaluates the performance of other employees. If so, the parties should explain whether the employees who are evaluated are members of the existing bargaining unit and whether the performance evaluations affect pay. The parties also should indicate whether the incumbent in the disputed position recommends or imposes discipline. If so, the parties should disclose the level of discipline (e.g., oral reprimand, written reprimand, suspension, and termination) that the employee can impose without prior approval and/or can recommend. The parties should detail what involvement, if any, the incumbent in the disputed position has had in the hiring and promotional processes and provide specific examples of that involvement.